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In the

Supreme Court of the United States

October Term, 1996

**UNIFIED SCHOOL DISTRICT NO. 259,
SEDGWICK COUNTY, KANSAS
Petitioner,**

v.

**MICHAEL FOWLER, BY HIS PARENTS AND NEXT FRIENDS, JAY AND BARBARA FOWLER
Respondents.**

**ON PETITION FOR WRIT OF *CERTIORARI*
TO THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT**

BRIEF *AMICUS CURIAE* OF NATIONAL SCHOOL BOARDS ASSOCIATION IN SUPPORT OF PETITION FOR WRIT OF *CERTIORARI*

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The parties have consented to the filing of this brief.

Letters of consent are on file with the Clerk of this Court.

INTEREST OF *AMICUS*

The National School Boards Association (NSBA) is a not-for-profit federation of this nation's 49 state school boards associations, the Hawaii State Board of Education, and the boards of education of the District of Columbia, the U.S. Virgin Islands and the Commonwealth of Puerto Rico. Founded in 1940, NSBA represents the nation's 95,000 school board members, who, in turn, govern 15,173 local school districts that serve more than 40 million public school students -- approximately 90 percent of all elementary and secondary students in the nation.

Each of the school districts in this nation receives or is eligible to receive federal financial assistance under the Individuals with Disabilities Education Act (IDEA), 20 U.S.C. §§ 1400 *et seq.*. Because recipients of federal funds under the IDEA are obligated to comply with certain conditions specified in the Act and its accompanying regulations, the subject of this case raises issues of great importance to school districts across the country.

REASONS FOR GRANTING THE WRIT

I. The Tenth Circuit's misinterpretation of the law will add to the already burdensome cost of special education.

II. The Tenth Circuit's ruling would force state and local education agencies to bear an inordinate financial load unrelieved by meager federal funding of special education.

III. The Tenth Circuit's conclusion that the IDEA requires public schools to pay for services to children voluntarily placed in private schools would set a precedent covering all "related services" and auxiliary aids, thereby forcing upon schools an obligation impossible to meet.

IV. The Tenth Circuit ruling makes it difficult for school districts to rely on the weight of jurisprudence and administrative interpretation when seeking to comply with the IDEA.

ARGUMENT

I. INTRODUCTION

The lower court grossly misinterpreted the Individuals with Disabilities Education Act to require a public school system to provide on site services to a child with disabilities who attends a private institution based on his parents' personal preference and in spite of the public school's offering of a free appropriate public education to the child in a public setting. If this ruling is allowed to stand, it will impose on school districts that have met their obligations under the IDEA a substantial financial burden not contemplated by the Act and one that they can ill afford given the already tremendous

costs of special education. It will further signal to school districts attempting to comply with the IDEA's requirements that they cannot rely on the implementing agency's own interpretation of the law in determining the limits of their obligations under the Act.

II. THE TENTH CIRCUIT'S MISINTERPRETATION OF THE LAW WILL ADD TO THE ALREADY BURDENSOME COST OF SPECIAL EDUCATION.

As the Petitioner has cogently argued in its brief to this Court, the lower court in this case has gravely misread the IDEA and its regulations and ignored administrative interpretations to place on public school districts the burden of showing why they should not pay for on site services to children attending private schools. The seriousness of this error in the law is magnified by its financial implications for public schools. The obligation under the IDEA to educate children with disabilities is an enormously expensive proposition paid for primarily with state and local tax dollars. In the 1992-93 school year, approximately 4.89 million children were served under Part B of the IDEA at a cost of more than $24.25 billion dollars. *See* U.S. Department of Education, *16th Annual Report to*

Congress on the Implementation of the Individuals with Disabilities Education Act xxiv, A-19 (1994) (hereinafter "*16th Annual Report*").

These figures reflect continuing increases in both the number of children served and the dollars spent to educate them. In 1976-77, 4.5% of children from birth through age 21 received services under the IDEA or Chapter 1 of the Elementary and Secondary Education Act; by 1992 this percentage had increased to 6.4%. *Id.* at 7. Likewise the costs have continually grown, more than doubling in ten years; in 1982-83 special education expenditures reached $11.75 billion and by 1992-93 had climbed to over $24 billion. One report estimates that between 1967 and 1991 the percentage of school spending on regular education declined from 80% to 59% of total education dollars, while the percentage spent on special education during that time frame shot up dramatically from 4% to 17%. Of net new money spent on education in 1991, regular education received 26% in contrast to 38% expended for special education. Rothstein, R. & K. Miles, *Where's the Money Gone? Changes in the Level and Composition of Education Spending* 7-8 (Economic Policy Institute

1995). There is nothing to suggest that these trends will stop or reverse themselves.

Although it is difficult even to estimate the additional expense that school districts would have to incur to pay for so called "related services" desired by children attending private schools by their parents' choice and without regard to the public schools' fulfillment of their obligation to provide a free appropriate public education, it can be safely said that the cost would be substantial by any measure. In this case the court awarded reimbursement to the plaintiffs in the amount of $15,550.43 for 1994-95 and an additional amount for services for 1995-96, *Fowler v. Unified School Dist., No. 259*, 900 F. Supp. 1540 (D. Kan. 1995). Similarly, in *Goodall v. Stafford County School Board*, 60 F.3d 168, 170 (4th Cir. 1995), the cost of a cued speech translator for a child attending a private school in Stafford County, Virginia, during the 1993-94 school year was estimated to be $14,000. These figures are in stark contrast to an average per pupil expenditure in the United States of approximately $5594 in 1992-93 and to the $8902 per pupil expenditure in New York, one of the

highest in the nation. *See* U.S. Department of Education, Office of Educational Research and Improvement, *Digest of Education Statistics 1995*, Table 164 at 164.

Given the current magnitude of expenditures for special education and the ever increasing number of children who are classified as disabled and entitled to a free appropriate public education, absent some clear statutory or regulatory mandate, schools should not also be forced to pay for on site services to children who attend private schools by virtue of their parents uncoerced decision to forego the free appropriate education offered to them by the public school. There is no such directive in the IDEA or its regulations; the Tenth Circuit reached a contrary conclusion based on a simplistic analysis.

III. THE TENTH CIRCUIT'S RULING WOULD FORCE STATE AND LOCAL EDUCATION AGENCIES TO BEAR AN INORDINATE FINANCIAL LOAD UNRELIEVED BY MEAGER FEDERAL FUNDING OF SPECIAL EDUCATION.

In enacting the IDEA, Congress recognized the limited financial resources available to state and local education agencies to

develop programs for children with disabilities. *See* 20 U.S.C. § 1400(b)(8), (9). When the Education of the Handicapped Act (now Part B of IDEA) was passed in 1975, Congress made a commitment to provide states with 40% of the national average per pupil expenditure for each eligible child to be used to defray the "excess cost" associated with meeting the educational needs of children with disabilities. Unfortunately, Congress has never even come close to meeting that promise. Funding for the program has never exceeded 12% of the national average per pupil expenditure. U.S. Department of Education, *Justification of Appropriation Estimates to the Congress Fiscal Year 1993*, at F-19 (1992). At 1992-93 spending levels, Congress provided approximately 8.3% through Part B. To meet the 40% target, Congress would have had to appropriate approximately $9.7 billion as opposed to the approximately $2.2 billion it actually did. *16th Annual Report*, at xxiv. Given the current financial climate, it is doubtful that Congress will meet its promise any time in the near future.

In light of Congress' failure to provide the state and local education agencies with adequate financial assistance to pay for the costs of special education, any judicial interpretations of the IDEA which inflict additional obligations to pay for services to yet another group of children fall inordinately upon already overburdened local public education budgets. Congress, the U.S. Department of Education and at least two courts of appeals that have confronted the issue have recognized that public school systems are not obligated to provide services to children placed voluntarily in private schools by their parents when the public school has already offered those children a free appropriate public education. The lower court's decision would result in siphoning funds from school systems that have already provided appropriate programs, thereby causing an unjustifiable drain on an already limited amount of funds.

IV. THE TENTH CIRCUIT'S CONCLUSION THAT THE IDEA REQUIRES PUBLIC SCHOOLS TO PAY FOR SERVICES TO CHILDREN VOLUNTARILY PLACED IN PRIVATE SCHOOLS WOULD SET A PRECEDENT COVERING ALL "RELATED SERVICES" AND AUXILIARY AIDS, THEREBY FORCING UPON SCHOOLS AN OBLIGATION IMPOSSIBLE TO MEET.

The lower court's decision in this case placing the burden on the public schools to show why they should not provide a sign language interpreter to a disabled student attending a non-public school, sets a precedent that would require school districts to provide all related services and auxiliary aids to children no matter where their parents enrolled them and regardless of their receipt of special education. Related services are defined under the IDEA as those specified services that "may be required to assist a child with a disability to benefit from special education." 20 U.S.C. § 1401

Taken to its logical conclusion, this interpretation of the law would create an obligation for public schools to provide whatever "related service" any child needed in whatever private school the child attends.

The implications of such a precedent are vast when one considers the scope of possible related services and auxiliary aids. The statutory definition alone specifies the following: "transportation, and such developmental, corrective, and other supportive services (including speech pathology and audiology, psychological services,

physical and occupational therapy, recreation, including therapeutic recreation, social work services, counseling services, including rehabilitation counseling and medical services, except that such medical services shall be for diagnostic and evaluation purposes only). . . and includes the early identification and assessment of disabling conditions in children." 20 U.S.C. § 1401(17). The regulations add to the list of related services, "school health services" and "parent counseling and training." 34 C.F.R. § 300.16. In a note to this section of the regulations, the Department of Education states: "The list of related services is not exhaustive and may include other developmental, corrective, or supportive services (such as artistic and cultural programs, and art, music, and dance therapy) . . . Each related service . . . may include appropriate administrative and supervisory activities that are necessary for program planning, management and evaluation."

Under administrative and court rulings, schools have been required to provide such related services as portable personal computer packages (*In re Mary H.*, EHLR 506:325 (SEA 1984));

clean intermittent catheterization (*Irving Independent School Dist. v. Tatro*, 468 U.S. 883 (1984)); full-time, one-to-one aides (*Thornock v. Boise Independent School Dist.*, 767 P.2d 1241 (Sup. Ct. Id. 1988)); feeding therapy (*City School Dist. of City of New York*, EHLR 502:315 (SEA 1981)); tracheotomy tube reinsertion (*Hawaii Department of Education v. Katherine D.*, 727 F.2d 809 (9th Cir. 1983)); psychotherapy (*In the Interest of Claudia K.*, EHLR 553:260 (Cir. Ct. Il. 1981)); after school community activities (*In re Sara S.*, EHLR 507:308 (SEA 1985)); family travel to residential placement (*Cohen v. Dade County School Board*, 450 So.2d 1238 (3rd Dist. Ct. App. Fla. 1984)); Self-Injurious Behavior Inhibiting System (*Northville Public School*, 16 EHLR 847 (SEA MI 1990)); professional nursing care (*Neely v. Rutherford County School*, 851 F. Supp. 888 (M.D. Tenn. 1994)); and inpatient care at psychiatric hospital (*Manchester School Dist. v. Charles M.F.*, 21 IDELR 732 (D.N.H. 1994)).

The potential scope of related services has been further expanded by virtue of the U.S. Department of Education's adoption

of a regulation in 1992 that requires school districts to ensure that assistive technology devices or assistive technology services are made available to children with disabilities when those devices or services are required as part of a child's special education, related services or supplementary aids and services. 34 C.F.R. § 300.308. Assistive technology device is defined in the statute as "any item, piece of equipment, or product system, whether acquired commercially off the shelf, modified, or customized, that is used to increase, maintain, or improve functional capabilities of individuals with disabilities," 20 U.S.C. § 1401(a)(25); assistive technology service means "any service that directly assists an individual with a disability in the selection, acquisition, or use of an assistive technology device." 20 U.S.C. § 1401(a)(26). Under these definitions, administrative rulings have required schools to provide calculators (*Letter to Lambert*, 18 IDELR 1039 (OSEP 1992)); hearing aids (*Letter to Seiler*, 20 IDELR 1216 (OSEP 1993)); mechanical reader to transcribe textbooks (*Philip B. v. Houston Independent School Dist.*, No. 177-SE-293

(Tex. Hearing Officer Decision, June 1993)); and large print textbooks (*Letter to Shelby*, 21 IDELR 61 (OSERS 1994)).

Clearly, very few, if any, school districts could sustain the potential cost of providing this enormous array of services to children attending private schools voluntarily. However, that is exactly what the Tenth Circuit has cavalierly and erroneously declared is required by the IDEA.

V. THE TENTH CIRCUIT RULING MAKES IT DIFFICULT FOR SCHOOL DISTRICTS TO RELY ON THE WEIGHT OF JURISPRUDENCE AND ADMINISTRATIVE INTERPRETATION WHEN SEEKING TO COMPLY WITH THE IDEA.

In general, school districts try to comply with the mandates of the IDEA. While some of the law's directives are clear on their face (though perhaps less so in individual application), many other areas of special education law have needed the repeated interpretation of the courts and administrative agencies to settle more uncertain issues. In areas where the statutory and regulatory language is unclear, school districts and their counsel justifiably look to rulings of these entities in determining what legal obligations a school district has under the

IDEA. However, the Tenth Circuit's decision below makes such an otherwise prudent approach perilous. In its disregard for the rulings of other circuit courts and its dismissal of the implementing agency's interpretation of its own regulations, the lower court casts school districts into legal quandaries that have no answers, thus forcing them to take action subject to judicial caprice rather than ordered precedent.

The school district's action in this case is supported by the greater weight of jurisprudence on this issue. Similarly, rulings from the U.S. Department of Education confirm the agreement of the federal implementing and enforcement agency with the acceptability under the IDEA of the school district's position. In *Zobrest v. Catalina Foothills School Dist.*, 115 S. Ct. 2462 (1993), in which the Court held that the Establishment Clause does not prohibit a public school from supplying an interpreter in a private religious school, the U.S. Government's brief argued that "the IDEA itself does not establish an individual entitlement to services for students placed in private schools at their parents' option." *Id.* at 2470 (Blackmun, J.

dissenting). The Court in *Zobrest*, however, did not reach the question of whether IDEA mandates that interpreter services be provided in private schools.

The Government filed a brief *amicus curiae* below supporting the school district.

> No individual disabled child who is voluntarily enrolled in a private school has an entitlement under IDEA and its regulations to any particular free service from her local school district . . . The stakes here are high. School districts across the country have come to rely on the Secretary's interpretation when devising and implementing their programs for students in private schools; it must be remembered that the overwhelming bulk of money spent on special education is from the state and local level with federal money only a small fraction of the cost. IDEA does create an individual entitlement for any child enrolled in a *public* school. See 20 U.S.C. 1412(1). If, as the district court held a child enrolled in a *private* school also has an individual entitlement, enforceable in court, the costs to local school districts would greatly increase, even while their range of discretion in designing programs decreases. That would impose extraordinarily overreaching financial obligations on states, far beyond their reasonable expectations when they decided to participate in this program.

Brief of the United States in Support of Appellant, *Unified School District No. 259 v. Fowler,* (No. 95-3373, 95-3400), p. 8-9.

This Court has admonished that "the administrative interpretation of the act by the enforcing agency is entitled to great deference," *Griggs v. Duke Power Co.*, 401 U.S. 424, 434-35 (1971). The lower court in this case gave the Government's view little deference.

Burlington School Committee v. Dept. of Educ., 471 U.S. 359 (1985), raised the issue of whether school districts must reimburse parents for the cost of private school tuition in which the parents unilaterally placed their child. This Court ruled that the parents are entitled to reimbursement if the public school *failed* to provide a free appropriate education in a public setting, but the parent would be "barred from obtaining reimbursement" where the school district had proposed an appropriate individualized education program." This conclusion is supported by the agency's interpretation of the Act's application to private placements by the parents. 34 C.F.R. § 300.403

It would seem to follow that school districts may also rely on the Department's interpretation of the law regarding the obligation to provide "related services" provided to private school students.

While lower courts certainly have authority to clarify the law and reconcile language with application, *Amicus* submits that where administrative interpretation and financial feasibility indicate the same result, school districts should be able to rely on these guides in attempting to comply with the law. *Amicus* submits that it is vital that this Court clarify this issue so as to assure school districts of the legal propriety of following established precedent and administrative interpretations.

VI. THE TENTH CIRCUIT'S RULING OVERSTEPS THE BOUNDS OF REVIEW IN IDEA CASES AS ESTABLISHED IN *ROWLEY* BY DECIDING AN ISSUE OF EDUCATIONAL METHODOLOGY.

In its very first ruling under the IDEA (then called the Education of All Handicapped Children Act), *Board of Education v. Rowley*, 458 U.S. 176, 206-07 (1982), this Court established the scope of inquiry that a court should make in reviewing administrative proceedings. This Court instructed lower courts to consider first, whether the state complied with the procedures set forth in the Act and second, whether the individual education program developed through these procedures was reasonably calculated to enable a child

to receive educational benefits. If the state has complied with these obligations, courts can require no more. The Court further cautioned that courts should avoid imposing their view of preferable educational methods on the states, saying that "once a court determines that the requirements of the Act have been met, questions of methodology are for resolution by the States." *Id.* at 207-08. In the instant case, there is no dispute that the school district adhered to the IDEA's procedural safeguards and that the individual education program it offered to Michael Fowler met his needs and constituted a free appropriate public education. Under *Rowley* standards, the lower court should have ceased its inquiry and required nothing more of the school district. The choice of enrolling Michael in a private school was a private choice by his parents. The IDEA requires nothing more than that a free appropriate public education be afforded to him by the school district, while he is enrolled in the public schools. The only obligation to him as a private school student is that services be available to him at a site selected by the school district.

CONCLUSION

For the reasons stated above, *Amicus* respectfully requests this Court to grant the Petition for *Certiorari.*

Respectfully submitted,

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